FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

September 29, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-451-M
Petitioner	:	A. C. No. 02-01691-05844
	:	
	:	Docket No. WEST 2004-76-M
	:	A. C. No. 02-01691-10445
v.	:	
	:	Docket No. WEST 2004-103-M
	:	A. C. No. 02-01691-12689
	:	
	:	Docket No. WEST 2004-196-M
QMAX COMPANY,	:	A. C. No. 02-01691-17038
Respondent	:	
	:	Portable Plant for Qmax Co.
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-61-M
Petitioner	:	A. C. No. 02-01691-27590A
v.	:	
	:	
JAMES L. FANN, Employed by	:	
QMAX COMPANY,	:	Portable Plant for Qmax Co.
Respondent	:	

DECISION

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Secretary of Labor;
James L. Fann, Elaine P. Fann, Williams, Arizona, on behalf of Qmax Company and James L. Fann.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 ("Act"). The petitions allege that Qmax Company ("Qmax") is liable for twelve violations of the Secretary's regulations applicable to surface metal and non-metal mines, and propose the imposition of civil penalties totaling $1,539.00. The petition in Docket No. WEST 2005-61-M alleges that James L. Fann, Qmax's president at the time, is liable,

in his individual capacity, for one such violation, and proposes a civil penalty in the amount of $500.00. A hearing was held in Flagstaff, Arizona. After receipt of the transcript, the Secretary submitted her post-hearing brief. Shortly thereafter, James Fann died after suffering a spontaneous intra cerebral hemorrhage. He is survived by his wife, Elaine P. Fann, who is also the personal representative of Mr. Fann's estate. Further settlement negotiations proved unsuccessful and Respondents' brief was then filed. For the reasons set forth below, I find that Respondent, Qmax, committed six of the alleged violations and impose civil penalties totaling $333.00. I also find that the action against James L. Fann did not survive his death, and dismiss the petition filed against him.

The Record

The record in these actions consists of the transcript of the hearing and the exhibits admitted into evidence. During the course of the hearing, Respondents requested leave to supplement the record with an amended affidavit and a statement pointing out portions of MSHA video tape training materials, exhibits R-5 and R-6 (103-M), that they contend are particularly relevant.[1] The amended affidavit of Scott Langstaff was submitted by facsimile on February 17, 2006, and a letter dated February 22, 2006, addressed the contents of the video tapes and other issues. The Secretary objected to the amended affidavit, and agreed with the proposal advanced by the undersigned Administrative Law Judge, that the letter be treated as part of Respondents' brief. Respondents' request to supplement the record with the amended affidavit of Scott Langstaff is hereby denied. The amendment to the original affidavit, exhibit R-14 (103-M), adds nothing of relevance. The letter, which was intended to highlight portions of video tapes that Respondents contended were particularly relevant, goes well beyond that stated purpose. It will not be considered as part of the evidentiary record, but as part of Respondents' brief.

Findings of Fact - Conclusions of Law

Qmax operates a small portable crushing and screening plant near Williams, Arizona. On June 17 and 18, 2003, Jerry Kissell, an Inspector employed with the Department of Labor's Mine Safety & Health Administration ("MSHA"), conducted an inspection of the Qmax plant. He issued four citations charging Qmax with violations of safety and health standards. On August 20 and 21, 2003, he returned to the plant to investigate a complaint regarding safety violations that had been reported telephonically to MSHA. In the course of that investigation, he issued seven citations for various alleged violations. When he returned on August 25, 2003, to deliver copies of the citations, he observed what he believed to be a serious safety violation and issued another citation. Following a special investigation, that citation was also issued to James L. Fann, charging him in his individual capacity as a "director, officer, or agent of [Qmax] who knowingly authorized, ordered, or carried out" the violation. 30 U.S.C. § 820(c).

The relationship between Qmax and MSHA was clearly strained, and became increasingly

[1] Respondents submitted separate sets of exhibits for each docket number. The information provided in parentheses refers to the docket number of the penalty proceeding.

so during Kissell's inspections. James Fann had requested a Compliance Assistance Visit ("CAV") when he was setting up the operation in the summer of 2002.[2] Tr. 414. Although he had had substantial experience in the industry, he was restarting operations that had been dormant since 1996. MSHA denied the request. Fann believed that many of the citations issued during Kissell's inspections could have been avoided if a CAV had been provided. He repeatedly protested the denial of the CAV request in response to the issuance of the citations. Ex. R-19 (451-M), R-10 (196-M), R-12 (196-M). He raised it with Kissell at the beginning of the inspection and, according to Kissell, appeared agitated with MSHA and complained of inconsistency during the inspection. Ex. R-11 (451-M) at 5, 15. Fann testified that Kissell made disparaging comments to the effect that, as a mine operator with millions of dollars worth of equipment, all he was interested in was profits, not the safety of miners. Fann defended Qmax's prior safety record, and countered that the equipment was worth considerably less than Kissell thought and that much of it was rented at a cost of about $2,500.00 per day. Tr. 419, 507-08. Fann was concerned that Kissell's multiple inspection days resulted in a virtual shut-down of operations, and considerable expense to Qmax.[3] Tr. 601-03. Fann reacted angrily when advised of some of the citations, and claimed that Kissell "threatened" excessive enforcement actions.[4] Fann also raised other issues, including not being properly advised of conference rights and not getting a copy of the hazard complaint that prompted the second inspection. Most of the arguments were premised upon Fann's view that under the Act and MSHA's published policy, MSHA should have been more helpful in providing technical assistance rather than emphasizing enforcement action, particularly as to small operators whose operations experienced more disruption by inspections. *See* 30 U.S.C. § 952(b).

As explained in a January 30, 2004, letter, manpower limitations in the Mesa, Arizona field office dictated that MSHA be "very selective" in providing CAVs and, since Qmax had previously been in the industry for many years, its request was denied. Ex. R-14 (196-M). While the question of whether a CAV should have been provided is not an issue in these cases, the denial of the request appears to have been reasonable. In addition, with one possible exception, it is difficult to perceive

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[2] As explained in MSHA's Program Policy Manual ("PPM"), a Compliance Assistance Visit is conducted like a regular inspection, except that citations issued for potential violations are marked "CAV-NONPENALTY." Inspectors assure that appropriate corrective action had been taken during subsequent regular inspections. PPM, IV, § G-3.

[3] See n. 5, *infra*.

[4] Citation No. 6292706, issued on June 17, 2003, the first day of Kissell's inspection, particularly angered Fann. It alleged a violation of a rollover protection labeling requirement on an excavator. Based upon consultations with the manufacturer and others, Qmax protested that the citation had been issued in error. The conflict was not immediately resolved, and Kissell threatened to red-tag the excavator on a subsequent visit, which would have significantly impaired Qmax's operation. As Fann explained at the hearing, "there are suggestions in here that I became irritated, that is right, I did, and what I thought was good reason." Tr. 415-16; ex. R-19 (451-M). That citation is not at issue in these proceedings, apparently because MSHA eventually agreed with Fann's position. Ex. R-10 (196-M) at 3.

how a CAV could have avoided the citations at issue. The other issues, e.g., the alleged failure to fully advise Fann of conference rights, are also irrelevant to the disposition of the particular violations alleged in these cases.

Fortunately, overtly adversarial behavior was not exhibited in the course of the hearing. All parties, representatives and witnesses conducted themselves with a high degree of professionalism throughout the proceedings. It is unnecessary to decide exactly when or how the strained relationship was initiated or escalated, and no attempt will be made to do so. However, it does appear that a more civil and cooperative relationship may have resulted in fewer or less serious enforcement actions and/or a significantly higher chance of resolution short of a decision by an Administrative Law Judge after a three-day hearing. MSHA's policies recognize that enforcement actions can have a disproportionate adverse impact on small operators and, under the circumstances, Fann's reaction is at least somewhat understandable.[5]

Fann and Qmax timely contested the citations and the assessed penalties. The citations are discussed below in the order that they were presented at the hearing.

Citation No. 6292707

Citation No. 6292707 alleges a violation of 30 C.F.R. § 56.4230, which provides:

> (a)(1) Whenever a fire or its effects could impede escape from self-propelled equipment, a fire extinguisher shall be on the equipment.
>
> (2) Whenever a fire or its effects would not impede escape from the equipment but could affect the escape of other persons in the area, a fire extinguisher shall be on the equipment or within 100 feet of the equipment.

The citation specifically alleges a violation of section 56.4230(a)(2). Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> A fire extinguisher was not provided on or within 100 feet of the Caterpillar 225-DLC track-hoe (excavator), Unit # EX-10. The track-hoe is used to break rocks with a hydraulic hammer. No visible oil leaks or fire hazard potentials were observed.

Ex. P-4.

Kissell determined that it was unlikely that the violation would result in an injury resulting

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[5] MSHA's PPM recognizes that inspections of small mines often dictate that "time devoted to accompanying an inspector be subtracted from productive endeavors and may be a financial burden on the operator." It further specifies that "all issues should be addressed during a single inspection so that the number of follow-up inspections for compliance purposes can be reduced to an absolute minimum." PPM, IV, § G-7.

in lost work days or restricted duty, that the violation was not significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

The excavator in question operated in the quarry and near the primary crusher. It had a two-piece mobile boom, on which was mounted a hydraulic hammer that was used for breaking large rocks. When not in the quarry, it was parked on the side of the feed ramp to the primary crusher, where it was available to break rocks that were too large to pass through the crusher's grizzly. In order to break such rocks, the excavator was maneuvered so that the arm with the hammer swung out over the feed hopper. Because the operator could not see into the hopper, a person climbed up to the crusher operator's platform and used hand signals to guide the excavator operator to position the hammer on a rock. The crusher operator's platform had a railing around it, and was accessed by ladder from the rear. A piece of conveyor belt was attached to the railing on the side nearest the hopper and the two adjacent sides, to deflect pieces of rock that might be impelled by the hammer. The crusher operator's platform is shown on the left side of photographs introduced by Respondent, in which a portion of the yellow-painted excavator, located on the feed ramp, is also visible. Ex. R-2, R-2A (451-M). Normally, the excavator was operated by the miner who operated the front-end loader that fed the hopper.

The citation, as written, alleges a violation of section 56.4230(a)(2), which concerns the ability of *persons other than the equipment operator* to escape a fire. However, it is apparent that Kissell was more concerned about the excavator operator. His justification for the gravity of the violation, as recorded at the time he decided to issue a citation, reads "persons caught in fire with no extinguisher on mobile equipment could receive lost time from work due to injuries." Ex. P-5. Kissell readily admitted that he wanted to write the citation under subsection (a)(1), because he was more concerned about the excavator operator, but was convinced by "someone" not to do so. Tr. 230-31. He believed that he could have better supported such a violation.

Kissell had difficulty explaining how someone other than the excavator operator might have his ability to escape impeded by a fire on the excavator. The "persons" referenced in his documentation are not identified. He speculated that a laborer or another loader operator might be in the vicinity, but was unable to explain why either of those persons couldn't have simply walked or driven away. Fann explained that, because of space limitations, no loader could use the feed ramp while the excavator was operating, and that no other individual would be in the area. Tr. 431-33. At the hearing, Kissell focused upon a fire impairing the escape of the person on the crusher operator's platform. However, at the time he wrote the citation, he did not know that a person would be in that position. Tr. 61-62, 222-24. His recollection was also affected by the lengthy passage of time between the issuance of the citation and his testimony, and he testified that he may have "mixed a few of the ideas between each inspection to a certain extent." Tr. 223. Also troubling is an inconsistency in his testimony regarding input from other MSHA officials. He testified on cross-examination that, as to all of the citations issued during the June 17 inspection, including specifically this one, he received "no input from the field office" and that all of the citations were "my decisions and based upon my observations." Tr. 68-69. However, as noted above, there

was significant input from the field office, in that "someone" convinced him to base the charge on section 56.4230(a)(2), rather than sub-section (a)(1). Tr. 230-33.

Kissell finally conceded, that "it would be difficult in this case" to conjure up a situation where the ability of a person other than the excavator operator to escape would be impaired by a fire on the excavator. Tr. 230-31. In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd, Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co*., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co*., 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

I find that the Secretary has failed to carry her burden of proof on this violation. Specifically, it has not been established by a preponderance the evidence that a fire on the excavator could affect the escape of other persons in the area. In addition, I find that there was a fire extinguisher located within 100 feet of the excavator. Mrs. Fann, who I found highly credible, described the location of a fire extinguisher that was present on the day in question, located within 100 feet of the subject area. Tr. 446-48; ex. R-2, R2-A (451-M). Mr. Fann also testified that that fire extinguisher was present at that location on the day in question. Tr. 433-35. Kissell testified that the fire extinguisher was not present. Tr. 65. However, his testimony was based upon the absence of any notation of it in his field notes. Mrs. Fann was responsible for placement and maintenance of the fire extinguishers and I accept her testimony. Kissell may well have failed to note the presence of the fire extinguisher, which was partially hidden behind a tire.

Citation No. 6292708

Citation No. 6292708 alleges a violation of 30 C.F.R. § 56.12016, which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The jaw-crusher under feed belt was not locked or tagged out by persons who had been doing repair work on a torn belt on this conveyor. The generator supplying electrical power to this conveyor was running and the main disconnect was in the on position. Persons who were to finish the repair work on this belt were exposed to the equipment being inadvertently started while working on the conveyor belt. Persons could be entangled in the equipment causing permanently disabling injuries.

Ex. P-7.

Kissell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that two employees were affected, and that the operator's negligence was low. A civil penalty in the amount of $75.00 has been proposed for this violation.

The Violation

Two miners were engaged in repairing tears in the conveyor belt. Despite the presence of suitable devices, they had failed to lock-out and tag-out the electrical controls to the conveyor while they performed the work, and had not placed any warning notices at the power switch. They explained that they felt secure and safe, apparently because they were the only individuals present on the site that were authorized to operate controls starting and stopping equipment, such as the conveyor. Tr. 90, 483. It is clear that the regulation was violated.[6]

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

[6] Respondent appears to argue that the circumstances amount to sufficient "other measures" having been taken. However, the regulation, when read in its entirety, makes clear that use of physical devices that would prevent energizing of the equipment is required.

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Because electrical power to the conveyor was not positively disconnected, the conveyor could have been started by activation of a switch located in the plant's control room. There was no clear view of the work area from the control room. There were also other persons on the site who could have entered the unlocked control room and inadvertently activated the switch. Tr. 8, 83-84, 90-91. Based upon those facts, Kissell concluded that it was reasonably likely that the conveyor could have been started while the men were working on it. As to the mechanism and severity of any possible injury, he believed that rivets that had been used to repair the belt, some of which had not yet been cut off, could have caught the clothing of one of the men and dragged him to the wiper blade of the self-cleaning belt, resulting in serious injury. Tr. 86. Although he also thought it possible that a person could get pulled over the self-cleaner blade to the tail pulley and suffer a fatal injury, he did not believe that was reasonably likely to happen. Tr. 75-76, 86-87.

Qmax contends that there was no realistic possibility that the conveyor would be started while the men were working on it. The men doing the work were the only persons on the mine site that were authorized to operate the equipment. Tr. 488. While there were other persons on the site, i.e., a laborer and two loader operators, it was unlikely that they would enter the control trailer, which was posted with appropriate signage, and even more unlikely that they would activate any equipment because, they were not authorized to do so. Tr. 101; ex. R-10(B) (451-M). Moreover, the conveyor switch was not mounted on the control panel. It was located in the Northwest corner of the control room, in a location that was hard to access. Tr. 93, 485.

A failure to lock-out and tag-out electrically powered equipment while work is being performed is normally a very serious violation. Mistaken, or inadvertent activation of the equipment can often result in serious, even fatal, injuries. On the particular facts of this case, however, I find that the Secretary has failed to carry her burden of proving that the violation was S&S. The violative condition was of relatively short duration. Because of the limited number of people who could have entered the control room and the relative inaccessibility of the switch, the risk of inadvertent start-up was small, and the possibility that a serious injury would have occurred if the equipment were started, was also small.

The citation was issued at 8:50 a.m., and the work on the belt had been partially completed. There is limited evidence in the record as to when the work had been started and how long it would have continued. However, from the facts available, it appears that it most likely started at the beginning of the work day and would have been completed that morning. Consequently, the condition would have existed for no more than a few hours, during which time the men would have periodically stopped working on the belt, and re-positioned it so that another tear could be repaired.[7] While it is possible that other persons working at the site could have entered the control room during that time, there is virtually no evidence of the likelihood of that happening, and it remains little more than a theoretical possibility. It appears that there were only two or three other persons who may have been working, and there is limited evidence as to their locations and assignments. None of them were authorized to operate the equipment, and it is unlikely that they would have volitionally attempted to do so. When combined with the relative inaccessibility of the switch, making the possibility of inadvertent contact unlikely, the possibility that the conveyor would have been started while the men were working on it was highly remote.

Also remote was the possibility that either of the men would have suffered a serious injury if the conveyor had been started while they were working on the belt. The specific work site is depicted in photographs taken by Kissell. Ex. P-8, P-9. The men were working under the belt, which, if started, would have moved from left to right as seen in the photographs. That would, no doubt, have been a startling occurrence. However, it does not pose an obvious threat of serious injury. Kissell postulated that un-cut rivets protruding about one inch from the belt could have snagged one of the men's clothing and dragged him into the self-cleaning wiper blade. Like his analysis of whether the

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[7] The men were repairing several tears, and had to re-position the belt to move the tears to a location where they could be worked on. The need to periodically re-position the belt may have been a consideration in their decision not to lock-out and tag-out the equipment.

conveyor could have been started, however, his injury assessment appears to be focused on a theoretical possibility and did not progress to any realistic assessment of the likelihood of a serious injury occurring. The process by which repairs were being made to the belt was not explained, other than the fact that rivets were being used. The positions that the men would have been in at various points in the process, the type of clothing that they were wearing, whether or how often they would have been positioned such that an uncut rivet could have caught that clothing if the belt had moved, are all questions left unanswered on the record.

On consideration of all of these factors, I find that the Secretary has not proven by a preponderance of the evidence that an injury was reasonably likely to occur because of the hazard contributed to, or that any injury would have been of a reasonably serious nature. The violation was not S&S. I agree that the operator's negligence was low and that two persons were affected by the violation.

Citation No. 6292709

Citation No. 6292709 alleges a violation of 30 C.F.R. § 56.14132(a), which provides: "Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The back-up alarm on the International S-1900 welding truck, Unit # TM-08, was not maintained in functional condition. Employees in the mine plant are exposed to being struck by this truck when it is backing up. Mobile equipment and foot traffic work in the same areas that this truck is used daily. The truck is used as needed throughout the mine for repair work.

Ex. P-14.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $91.00 has been proposed for this violation.

The Violation – S&S

Respondent admitted that the welding truck in question was equipped with a back-up alarm and that the alarm did not work when tested by Kissell. Tr. 494; ex. P-2, P-3. Therefore, the specific portion of the regulation cited in the citation was violated. The truck was used occasionally throughout the plant on an as-needed basis. The alarm had been working when last checked, but a wire had become disconnected shortly before the inspection. Tr. 492. In Fann's experience, noise levels near the plant were typically so high that audible alarms were hard to hear, and men tended to get used to them, such that they were of marginal effectiveness. Tr. 493. For that reason, a written policy was in effect at Qmax requiring that a spotter or observer be present to assure that the intended backward path of "mechanic or service trucks" was clear of persons and objects. Tr. 493, 496; ex. R-

6. At the time of the violation, two men were working from the truck, and one was available to perform the observer's duties. Qmax's policy was consistent with the standard in question, which provides that a back-up alarm is not required when there is an "observer to signal when it is safe to back up." 30 C.F.R. § 56.14132(b)(1)(iv).[8]

There is no evidence that the miners who were using the truck were unaware of Qmax's policy, or otherwise not complying or intending to comply with it. While the failure to maintain the back-up alarm in functional condition was a violation of the regulation, the violation was purely technical. Use of an observer would be, as the regulation contemplates, at least as effective as an audible back-up alarm. Consequently, the malfunctioning alarm did not constitute a hazard, or present any risk of injury to miners. The violation was not S&S. I agree that the operator's negligence was low and that one person was affected by the violation.

Citation No. 6292710

Citation No. 6292710 alleges a violation of 30 C.F.R. § 56.14107(a), which provides: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The Svedala under-cone feed belt head pulley shaft was not guarded to prevent contact with the moving machine parts. The exposed shaft opening measured 4.5 inches wide, for the entire diameter of the pulley. The exposed shaft measured 61 inches above ground level. Persons do clean-up in this area 1-2 times weekly. Persons are exposed to entanglement injuries.

Ex. P-16.

Kissell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one employee was affected and that the operator's negligence was moderate. Qmax protested the issuance of this citation at an MSHA health and safety conference. As a result, another MSHA official modified the citation on September 30, 2003, to allege that an injury was unlikely and that the violation was not S&S.
A civil penalty in the amount of $106.00 had been proposed for this violation on August 7, 2003.

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[8] (b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have –
(i) An automatic reverse-activated signal alarm;
. . . .
. . . ; or
(iv) An observer to signal when it is safe to back up.

30 C.F.R. § 56.14132(b)

The assessment was not amended to reflect the modification of the citation.

The Violation

The cited condition is depicted in a series of photographs. Ex. P-17 thru P-20. The first photo shows the right side of the head pulley. Ex. P-17. The pinch point, where the conveyor belt contacts the drum of the pulley, is protected by the framing of the conveyor and an approximately 6-inch by 18-inch steel plate that appears to be a factory installed guard. The area that was the focus of the violation, according to Kissell, was the approximately 2.5-inch diameter shaft of the pulley that extends about 4.5 inches from a bearing mounted on the conveyor frame to the drum of the pulley. That shaft would spin at a high rate of speed, as would the drum of the pulley, which was also unguarded. Kissell's concern was that workers, who cleaned the area 1-2 times per week, might become entangled in the rotating shaft.

The modification to the citation cites the reason for changing the violation to non-S&S as "Person would have to reach up into the shaft and head pulley during operation, and only if maintenance was done during operation. Practice is to conduct maintenance when equipment is locked down." Ex. P-16. The cited reason for changing the probability of injury to "Unlikely" was "Equipment is locked out prior to conducting maintenance at the head pulley. In addition, person would have to reach up into this pulley and shaft during operation."

The location of the condition relative to the surrounding area is depicted in two photographs. Ex. P-19, P-20. The shaft was 61 inches above ground level. However, it was not directly accessible, because the tail pulley of another conveyor was located underneath the head pulley, and the guard for that pulley extended beyond the end of the bearing of the head pulley's shaft. Ex. P-19, P-20. In order to reach the shaft, a person would have had to stand against the lower guard and reach up over it to the pulley shaft. While the distance from any potential walking or working surface to the shaft had both vertical and horizontal components, Kissell measured only the vertical component. Tr. 145.

In construing an analogous standard[9] in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission stated:

> We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

I find that under the standard, additional guarding was not required for the cited condition because there was no possibility of injury. While miners did clean around the area one to two times per week, they would have been located down the slope shown in the left-foreground of exhibit P-19, below the level Kissell used for his measurement, and some distance away from it. Tr. 775-76. They would have used shovels to move loose material away from the conveyor, and would have been unable to reach the head pulley's shaft, even if they had tried. Kissell believed that miners worked in the area directly adjacent to the guard, where he took his measurement.
Tr. 145. He also took particular note of footprints in the area, as shown in the photographs.
Tr. 132; ex. P-19, P-20. However, the footprints may well have been made by maintenance workers greasing the pulley bearing before operations began. Tr. 518. In addition, Kissell himself and/or his accompanying trainee may have walked in the area before the photo was taken.
Tr. 133. Both Mr. Fann and Mrs. Fann testified that Kissell's impression that miners would stand in close proximity to the belt and clean the area by shoveling the spillage onto the belt was erroneous. Tr. 520, 775-76. They explained that spilled material was "never" shoveled onto the belt because it would be unsafe and would contaminate the end product. Tr. 520-22, 775-76. Kissell testified that his contrary understanding was based upon a conversation with one of Qmax's employees. Tr. 724-25. However, neither the conversation nor the information is reflected in his field notes or the citation documentation. Ex. R-4 (196-M); P-21. As previously noted, Kissell's recollection of events that had occurred over two years prior to his testimony was understandably not crystal clear. I accept Respondent's description of the process, and find that there was no walking or working surface within

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[9] 30 C.F.R. § 77.400
(a) Gears; sprockets; chains; drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

seven feet of the pulley shaft.[10] Even if miners occasionally worked closer to the conveyors and guards, I find that because of its nature, location, height, and the interference presented by the guard for the tail pulley, there was no risk of inadvertent contact, and that the pulley shaft did not present a hazard.[11]

The August 20-21, 2003, Hazard Complaint Inspection

On August 18, 2003, MSHA received a complaint alleging unsafe work practices and conditions, and violations of training and accident reporting regulations at Qmax's plant. Ex. R-7 (103-M) at 1. The complainant was Charles Manke, a miner who had recently been fired by James Fann for taking an unannounced two-week vacation. The complaint focused on three incidents, one of which did not lead to any enforcement action. On August 20 and 21, 2003, Kissell visited Qmax's plant to conduct an inspection regarding the complaint. He issued seven citations alleging violations related to two of the incidents. One had occurred on July 30 and involved Manke, and the second had occurred on August 4 and involved an injury to Mrs. Fann.

The July 30 Incident

On July 30, 2003, Manke was standing on a conveyor belt and jumped off as it was started. He suffered no reportable injury and did not seek medical attention. The conveyor in question was referred to as SP04A. Ex. P-6. It transported material being discharged from the "El-Jay Screen," located near the center of the plant. Occasionally, material falling onto the belt would cause it to stick. Tr. 558-60. Qmax's miners had developed an escalating set of responses to that problem. Initially, the belt was struck with a piece of wood or another available implement. If that didn't work, a miner stepped up onto the belt and jumped up and down.
Tr. 275, 558-60.

On July 30, James Fann was about to start the conveyor. He asked Manke to watch the belt to make sure it started. There was considerable noise in the area, so Fann mouthed the words to Manke and motioned with his hand and fingers to convey his message, and Manke nodded indicating that he understood what he was being asked to do. Tr. 567. Fann then walked over to the control trailer, and started the conveyor. In the interim, Manke mounted the conveyor. As it started, he

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[10] In addition to cleaning, maintenance was performed on the pulley, presumably greasing of the shaft bearing. However, Kissell did not identify exposure of maintenance workers as a reason for citing the condition or evaluating its gravity, most likely because, as noted in the modification, maintenance was performed while the equipment was not operating.

[11] Respondent also claimed lack of fair notice of the Secretary's interpretation that additional guarding was required. While the Secretary argues that the notice defense was not raised, I find that it was sufficiently raised by Respondent's repeated protests of denial of its CAV request, and in its responses to discovery. However, Respondent's inference that the equipment must have been inspected by MSHA at other facilities, while it was in the same configuration, is too speculative to establish a fair notice defense to this citation.

jumped off and scraped his right leg and knee.

Kissell interviewed Manke, although not at the Qmax plant, and concluded that Manke had been about 12 feet from the lower end of the belt and had jumped or fallen a distance of about 56 inches. On August 21, Kissell issued three citations with respect to the incident, charging Qmax with failure to sound a warning before starting the conveyor, failure to provide safe access to the position where the jumping occurred, and Manke's failure to wear fall protection.

Citation No. 6292733

Citation No. 6292733 alleges a violation of 30 C.F.R. § 56.15005, which provides, in pertinent part: "Safety belts and lines shall be worn when persons work where there is danger of falling." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> During a hazard complaint inspection, the company confirmed an employee had climbed onto a conveyor belt where a fall hazard existed without wearing fall protection. A fall of 56 inches existed at the time of the inspection. The owner did not direct the employee to climb on the belt. Employees had climbed on the conveyor belt to use their weight to break loose mud materials which would cause the belt to seize and not turn when started.

Ex. P-36.

Kissell determined that it was reasonably likely that the violation would result in an injury resulting in lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $72.00 has been proposed for this violation.

The Violation

There is no dispute that Manke was on the belt and jumped off as it was started. The major controversy is over his position on the belt when the incident occurred. Kissell concluded, from his interview with Manke three weeks after the incident, that he had been approximately 12 feet from the tail pulley, i.e., about half-way up the 24-foot conveyor, at which point he measured its height at 56 inches. Qmax contends that Manke was much closer to the tail pulley, and no more than two to three feet above the ground surface at the time. Its position is based upon the practice that the miners followed in breaking the belt loose, and Mrs. Fann's interview of Manke the day after the incident.

Unbeknownst to Kissell, Manke had reported the incident. Qmax's daily time cards provide space for recording accidents. Manke reported on his time card for July 30, 2003, that he had experienced a personal accident, which he described as "breaking belt loose Jim started belt and I got throw[n] off – scrape[d] right leg and knee." Ex. R-9 (103-M). Elaine Fann (then Moffitt) noted the report and investigated it the next day. She spoke to James Fann and Manke, and prepared an

"Accident/Incident Investigation Report."[12] Ex. R-8 (103-M). Her description of the incident noted that when the belt started "Manke jumped off to the ground, approx. 3ft." Her comments noted that Manke didn't want to go to a doctor and that: "He said he climbed on conveyor to look at belt but didn't get off before warning buzzer because he wanted to make sure belt was [moving]." Ex. R-8 (103-M). That note is followed by a question mark, because Manke's explanation of why he was on the belt did not make sense to her. Tr. 577; ex. R-8 (103-M).

The place where the belt became stuck was at its lower end, near the tail pulley, where material dropped onto it. Tr. 558, 593; ex. P-37. There was no reason for Manke or any other miner intent on freeing the belt to have gone more than a few feet from the tail pulley. Tr. 586.

The incident report is a critical piece of evidence in resolving the dispute about where Manke was when the belt started. It was prepared in the normal course of business by Elaine Fann, Qmax's safety officer, whose interest was assuring that Manke was healthy and ascertaining what had occurred so that future incidents could be avoided. There was no citation pending – no MSHA investigation – Manke had not been discharged – and no complaint had been filed with MSHA. Moreover, Mrs. Fann's investigation occurred less than 24 hours after, and at the scene of, the incident. Mrs. Fann went with Manke to the conveyor, and he pointed out to her where he was when the incident occurred. Tr. 575. It was at a point about six feet from the tail pulley, which she estimated to have been about three feet above the ground. Tr. 575. The comment about the buzzer sound was from Manke. Tr. 576.

Kissell's assessment of Manke's position is unreliable for a number of reasons. It was based upon an interview that did not occur until three weeks after the incident, and was not held at the mine site where the equipment was located. The complaint and interview followed Manke's termination.[13] Manke's verbal description left Kissell with conflicting information, i.e., that Manke was about halfway up the belt and at a height of six and one-half feet. Tr. 274. Kissell's measurements confirmed that, even at halfway up the belt, the height at the time of the inspection was 56 inches, and

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[12] Because Manke had indicated that he hadn't lost time from work or gone to a doctor, Kissell knew that the incident was not reportable as an injury under MSHA regulations. Tr. 335-45. Consequently, he did not ask if there was a report of the incident, and did not review the report during his investigation. Tr. 335-45. He was uncertain as to whether he had reviewed Manke's time card, although there is nothing in his notes to indicate that he had. Tr. 344-45; ex. R-7 (103-M).

[13] Kissell stated that the fact that Manke had been discharged had "no effect" on his evaluation of what Manke told him, but then added that he "considered the possibility of a disgruntled employee and tried to keep in mind that some of the allegations could be just made because of anger and disappointment." Tr. 363-64.

it may have been approximately one foot lower when the incident occurred.[14]

Kissell claimed to have confirmed Manke's approximate position in an interview with another miner. Tr. 290-91. However, there is no indication in any of his discussions with Fann or in Fann's testimony that anyone else was present or observed the incident. There is also nothing in those parts of his field notes that were introduced into evidence to confirm that such an interview occurred.[15] Ex. R-7 (103-M). In any event, whether or not he was able to confirm the somewhat vague description of "about half way up the belt" with another employee, it would do little to undermine the on-the-scene assessment made by Mrs. Fann.[16] In addition, other miners present during Kissell's discussion of the use of fall protection while on the conveyor questioned how a four-foot safety line would have helped "as the conveyor that Manke was on was only 2 to 3 foot off the ground at that point."[17] Ex. R-14 (103-M); tr. 624.

I find, as Manke explained to Mrs. Fann, that he stepped up onto the belt, in order to "unstick it." Using the procedure that had been developed at the mine, he was positioned at the lower end of the belt, near the tail pulley. There was no reason for Manke to have gone more than a few feet from the tail pulley, and I find that he did not do so. At the time of the July 30 incident, he was no more than three feet above the ground. His post-discharge claims to have gone up to a height of six and one-half feet, which would have been close to the head pulley, were obviously prompted by a desire to retaliate for his discharge. The failure to wear fall protection under such circumstances is not a violation of the regulation. The Secretary has failed to carry her burden of proof on this allegation.

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[14] Kissell noted in the body of the citation that: "A fall of 56 inches existed *at the time of the inspection*." The measurement is qualified because, as he noted in his field notes, the area had been "cleaned down approx. [one] foot." Ex. R-7 (103-M) at 15. At the time of the July 30 incident, the distance from the top-midpoint of the conveyor to the uncleaned ground surface would have been about 44 inches.

[15] There is a reference in Citation No. 6292737 to "another" person being in the area. That person has never been identified, and his location at the time is unknown. It is apparent that, whoever that person was, he played no part in the incident.

[16] The accuracy of Mrs. Fann's estimate is supported by a sketch depicting the slope of the 24-foot long conveyor, with its tail pulley at a height of 22 inches and its head pulley at a height of seven feet, nine inches. Ex. R-20 (103-M). While the conveyor had been relocated before those measurements were taken, it was in essentially the same configuration, and was blocked and supported, as it was on July 30. Tr. 587-89, 596-97, 632-33. The sketch shows that at 12 feet from the tail pulley, the height was 57 inches, nearly identical to Kissell's measurement. At six feet or less from the tail pulley, the height would have been no more than 37.5 inches, and with one foot of spilled material, it would have been only about two feet.

[17] There was conflicting testimony about what Mr. Fann saw from the control trailer. It was focused upon whether he saw, or could see, Manke's feet when he was on the belt, while in the air, or after he had landed. Tr. 283, 285-86, 292, 327, 580, 585-86. The uncertainties associated with this evidence render it unhelpful in determining Manke's position.

Citation No. 6292734

Citation No. 6292734 alleges a violation of 30 C.F.R. § 56.11001, which provides: "Safe means of access shall be provided and maintained to all working places." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> A means of safe access was not provided to the SPo4A conveyor belt. Persons are exposed to slip and fall hazards when they climb over the frame to gain access to the elevated conveyor belt. Persons perform this task as necessary during the shift.

Ex. P-40.

Kissell determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $106.00 has been proposed for this violation.

The Violation - S&S

This citation is related to the previous one, in that it is the practice of "climbing" or stepping up onto the SP04A belt and moving to a location to jump up and down to free the belt that gave rise to the alleged violation. This practice made the top of the belt a work place, according to Kissell. Tr. 322. As noted in a photograph of the conveyor, since there was "no ladder or stairs, or handrails provided to access the conveyor or walk on the belt," he determined that there was a hazard presented to miners who accessed that area. Ex. P-42.

Respondent's defense is that ladders were readily accessible to miners at Qmax and that the tail pulley end of the conveyor was only about two feet off the ground, allowing miners to simply step up onto the conveyor. As evidenced by photographs introduced by Respondent, there were several ladders available for use by miners at Qmax. Tr. 630; ex. R-4(e) and (f) (103-M). Kissell acknowledged that there were ladders present, but noted that ladders were not immediately adjacent to the belt. Tr. 323-24. Mr. Fann testified that miners simply stepped up onto the belt to access the area, and that Manke, who had had significant medical problems, had no trouble getting onto the conveyor.[18] Tr. 594.

It appears that, in assessing the safe access issue, Kissell was operating on the erroneous premise that the "work place" in question was the top of the belt about half way between the head and tail pulleys, a height of close to five feet above the ground. In fact, as decided above, the work place was close to the tail pulley, at a height of two to three feet above the ground. Kissell was concerned that a miner could fall while climbing onto the belt, and could suffer permanent injury "because they could fall from a distance depending where they chose to climb on." Tr. 324.

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[18] Fann stated that Manke had undergone two knee replacements and major back surgery, and did not have full movement. Tr. 594.

I find that ladders were available for miners to use, but that there was no requirement that they be used, and they were not used by miners accessing the belt to "unstick it." While miners simply stepped up onto the belt at the tail pulley end, they had to step first onto a relatively narrow part of the conveyor frame that typically had some spilled material on it, as shown in a photograph. Ex. P-42. They also had to negotiate the spillage guard plates, approximately one foot in height, that were erected around the bottom of the conveyor. A slip and fall hazard was presented by these obstacles, and a safe means of access was not provided to that work place. However, the heights involved were considerably lower than Kissell had believed. There would have been no reason for any miner to have climbed onto the conveyor at the 56-inch height that Kissell mistakenly believed the work place to be. While it might have been reasonably likely for an injury to occur, because of the lower height involved, it was not reasonably likely that any injury would have been reasonably serious. Consequently, the violation was not significant and substantial. I agree with the assessment of the operator's negligence as moderate.

Citation No. 6292737

Citation No. 6292737 alleges a violation of 30 C.F.R. § 56.14201(b), which provides:

> When the entire length of a conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The audible warning system for conveyor belt start-up was not sounded to warn persons of a conveyor belt start-up. One person was on the conveyor belt and another in the area when the conveyor was started. The entire length of the conveyor belt was not in sight from the start switch location. Persons unaware of equipment starting are exposed to serious injuries.

Ex. P-44.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was low. A civil penalty in the amount of $91.00 has been proposed for this violation.

The Violation - S&S

There is no dispute that the entire length of the SP04A conveyor belt was not visible from the starting switch location in the control trailer. Photographs of the scene show that only a few feet of the conveyor near the tail pulley could be seen from the window in the control trailer. In one photograph, a portion of the window is visible behind a ladder in the center of the picture. Ex. P-42. There is also no dispute that Mr. Fann advised Manke, both verbally and through hand signals, that

he should watch the belt, and that Fann proceeded directly to the control trailer to start the conveyor. [19] There is a question as to whether Manke understood Fann's communication, and whether it occurred within 30 seconds of his starting the belt. There is also a question as to whether Fann activated a warning buzzer prior to starting the conveyor.

When questioned by Kissell three weeks after the incident, and after having been fired, Manke reported that he did not hear Fann's verbal instruction and that he interpreted the hand signals as instructions to climb on the belt to unstick it. Tr. 349. He also said that he could not recall hearing the warning buzzer prior to the conveyer being started. However, Manke had reported to Mrs. Fann, the day after the incident, that he understood that he was supposed to watch the belt, and also mentioned the sounding of a warning buzzer. Tr. 574-75; ex. R-8 (103-M). He decided to climb on the belt to try and unstick it, believing that it would only take "just a second." Tr. 574-75. I find that Manke was effectively advised, both visibly and audibly, that Mr. Fann was going to start the conveyor, and that he made a personal decision to try and unstick it before the conveyor was started.

The Secretary's position appears to be that if Fann's warnings were effective, they did not occur within 30 seconds of his starting the conveyor, and that the functional and available audible warning buzzer system was not activated prior to starting the conveyor. There was considerable dispute at the hearing about the amount of time that elapsed between Fann's verbal and visual warnings and when he started the conveyor. Kissell testified that a "small test" was conducted and it took 25 to 29 seconds to move from where Fann gave the warnings to where he could activate the conveyor, "if he was moving fairly fast." Tr. 347. He also testified that the test showed that it could have been done in "approximately 28 seconds," but that a person "would have had to nearly been running." Tr. 726-27. Fann testified that he had demonstrated to Kissell that he, at age 72, could cover the distance in less than 30 seconds. Tr. 739-40. He also testified that there was no doubt in his mind that he covered the distance and activated the conveyor within 30 seconds, and opined that "If somebody is going to watch us any closer than that . . . then I need to get out of the business." Tr. 569.

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[19] Even the unknown third person, *see* n. 15, *supra*, confirmed that verbal and visual signals were given by Mr. Fann. Tr. 359.

> Kissell's citation documentation for this alleged violation includes the following language: The owner directed the employee to watch the conveyor belt, not climb on it, and told the employee that he was going to start the belt and then within approx. 10-15 seconds, started the belt. Employee was on the belt at the time and did not hear the warning horns.

Ex. R-7 (103-M) at 40. The Secretary had listed Kissell's citation documentation as an exhibit, but did not attempt to introduce it into evidence. Qmax introduced the document as part of Kissell's field notes.

Upon consideration of the above, I find that Mr. Fann provided a visual and audible warning that the conveyor was going to start within 30 seconds of its being started, effectively complying with the regulation.

Although it is not necessary to reach the issue, I also find that the warning buzzer system was sounded before the belt was started. This is a much closer question. At one point Kissell testified that Fann said he did not sound the buzzer. Tr. 359. However, he initially stated that Fann "hadn't said" that he sounded the buzzer. Tr. 349. His field notes reflect that the latter statement is more accurate. In response to Kissell's inquiry about the buzzer, Fann replied that he had made hand signals to Manke that he was going to start the conveyor. Ex. R-7 at 26. Kissell apparently did not follow-up on this indirect reply. Fann testified that he did not recall whether or not he sounded the buzzer, because "it's a natural thing." Tr. 570, 607. In contending that the buzzer was sounded, Qmax places great significance on the notation in the nearly contemporaneous incident report which, according to Mrs. Fann, reflects that Manke mentioned that a warning buzzer sounded. Tr. 576; ex. R- 8 (103-M). Kissell, as previously noted, was unaware of the incident report until the time of the hearing.

On balance, I find that the warning buzzer was sounded and that the Secretary failed to carry her burden of proving otherwise. It is understandable that witnesses would not be able to recall whether a routine practice, i.e., sounding the warning buzzer, actually occurred on a given occasion some three weeks in the past. This is especially so when it was not a focal point of any inquiry, because the persons involved understood that the conveyor was about to be started.
I accept Mrs. Fann's testimony that the mention of the warning buzzer came from Manke when she interviewed him at the scene the morning after the incident. This is a strong indication that Mr. Fann followed his routine practice of sounding the buzzer prior to starting the conveyor. The Secretary's evidence that those present did not later recall hearing a buzzer, when considered in light of the Manke statement, is insufficient to establish by a preponderance of the evidence that an audible warning was not sounded.

The August 4, 2003, incident

On August 4, 2003, Elaine Fann was assisting at the quarry because of the absence of the subject complaining miner. She was positioned on the crusher operator's platform and was guiding James Fann as he operated the excavator and positioned its hydraulic hammer to break rocks in the crusher's grizzly. Mrs. Fann had her hands on the railing of the platform. The hammer slipped off a rock and moved suddenly over to the platform crushing Mrs. Fann's left hand against the railing. In the course of investigating this incident Kissell issued four citations.

Citation No. 6292735

Citation No. 6292735 alleges a violation of 30 C.F.R. § 50.20(a), which requires that operators "mail completed [accident report] forms to MSHA within ten working days after an accident occurs. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The company failed to submit the MSHA 7000-1 Accident, Injury Report on time. The accident occurred on August 4th, 2003. The 7000-1 report was completed on August 19, 2003, one day late, and then mailed on August 20th, 2003, two days late.

Ex. P-22.

Kissell determined that there was no possibility of injury attributable to the violation, that it was not significant and substantial, that no employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

Mrs. Fann was hospitalized for five days, and multiple surgeries were eventually performed on her hand. Ex. R-3, R-4 (76-M). Because of a risk of infection, she was advised not to perform work. Mrs. Fann served as Qmax's administrative officer. She handled payroll and the bulk of office paperwork. The office consisted of a room in a ranch house, which was not a particularly sanitary environment. Acting on the advice of her doctor, she did not go to the office for several days. Tr. 525-26. She finally did go in, to handle payroll and prepare and file the required MSHA report of injury, which she deposited in the mail on August 19, the eleventh working day after the injury. Respondent readily admitted that the report was not mailed timely. Tr. 525; ex. P-29, P-30.

Mrs. Fann's testimony explains why the report was not timely submitted, but it does not raise a legal defense to the citation. Qmax, through its president and chief operating officer, James Fann, was obligated to comply with the regulation. It is understandable that Elaine Fann was not able to timely prepare and submit the report. However, James Fann should have been aware of the requirement and obtained necessary information and documentation from Elaine Fann, MSHA, the regulations, or any other source available to him, and complied with the injury reporting requirement within the two-week deadline. His explanation that he wouldn't have known where to find a copy of

the form in Qmax's files is unavailing. Tr. 529.

I find that the regulation was violated, as alleged, and concur with Kissell's evaluation of the gravity and operator's negligence.

Citation No. 6292736

Citation No. 6292736 alleges a violation of 30 C.F.R. § 46.9(a), which requires that operators "record and certify on MSHA Form 5000-23, or on a form that contains the information listed in paragraph (b) of this section, that each miner has received training required under this part." Subparagraph (b) describes the requirements of the certification, and subparagraph (c) provides that "new task training" shall be recorded and certified upon completion. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The company failed to record and certify that each miner had received the required training.

Ex. P-24.

Kissell determined that it was unlikely that the violation would result in an injury resulting in lost work days or restricted duty, that it was not significant and substantial, that no employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

This citation, and the one discussed immediately hereafter, No. 6292738, are related and there is some overlap in Kissell's citation documentation. Tr. 177. Citation No. 6292736 addresses Qmax's failure to document training given to Mrs. Fann. Kissell's understanding of Mrs. Fann's responsibilities when he conducted the June 17 inspection was that she was the administrative officer, who performed office duties and occasionally made deliveries to the mine. As such, she was not working as a miner and was not required to have been trained as a miner. Tr. 178-79. In fact, Mrs. Fann was an experienced miner, and had attained that status prior to the effective date of the training regulations. Tr. 532. As a result of the complaint investigation, Kissell became aware that, at the time of her injury, Mrs. Fann had been performing duties as a miner, including guiding the excavator operator from the crusher operator's platform. James Fann had given her new task training on operation of the crusher on the morning of the accident.
Tr. 533. However, that training had not been recorded and certified, as required by section 46.9(a) and (c)(3). Tr. 533. Qmax admitted that it did not have documentation for Mrs. Fann's training at the time of the August 20 -21 inspection. Ex. P-29, P-30. Mrs. Fann explained that the training she had received had not been recorded because she had been injured. Tr. 533.

Although admitting that the documentation did not exist, Qmax raises several arguments in its brief in defense of this citation. It argues that the citation is ambiguous, in that it does not specifically identify the training records at issue. However, the records in question must have been

sufficiently identified by Kissell, because he terminated the citation upon his return to the mine on August 25 and 26. Ex. P-24. Qmax also argues that certification of new task training is not required upon completion, citing 30 C.F.R. § 46.9(d)(3). However, that provision applies to ensuring that records are certified and that a copy is provided to the miner. Section 46.9(c)(3) requires that a record of new task training be made upon completion of the training. In addition, Qmax contends that the training had not been completed. However, it apparently has not advanced this contention previously. The regulation requires that new task training be completed before the miner performs the task, and it has not been disputed that Mrs. Fann had been trained in the new task she was performing at the time of her injury. 30 C.F.R. § 46.7(a).

I find that the regulation was violated, as alleged. Kissell testified that the citation mistakenly noted that the probability of an injury occurring was "Unlikely" that a "Lost Workdays" injury could result from the violation. In fact, as noted on his citation documentation, there was no likelihood of injury created by the violation. Tr. 183; ex. P-25. I agree with his assessment of gravity and operator negligence.

Citation No. 6292738

Citation No. 6292738 alleges a violation of 30 C.F.R. § 46.9(h), which requires, with exceptions not pertinent here, that operators maintain copies of training certificates and training records for each currently employed miner. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> The company failed to maintain records of training for two miners at the mine. Training had been done on 10/29/2002.

Ex. P-26.

Kissell determined that it was unlikely that the violation would result in an injury, that it was not significant and substantial, that no employees were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

The Violation

As evidenced by the citation documentation for Citation No. 6292736, the records in question were for annual refresher training of James Fann and Arillio Soto that had been administered on October 29, 2002. Ex. P-25. Kissell had actually reviewed those records during the June inspection, but requested that they again be produced during the August hazard complaint inspection. Tr. 187, 536. At the time, he knew that the training had been done, and that Qmax had recorded and certified it, as required by the regulation. Tr. 187, 537. However, the records had been moved, Elaine Fann was unable to locate them, and they were not produced at the time of the request. Tr. 184, 536. She did locate them shortly after Kissell departed, and was prepared to provide them if he returned on August 22. Tr. 536; ex. R-7 (76-M). However, Kissell did not return until August 25, at which time the records were produced and the citation was terminated. Ex. P-26.

There is no dispute that Qmax had maintained the required records. The cited portion of the regulation, 30 C.F.R. § 46.9(h), requires only that the records be maintained. The preceding subsection, 46.9(g), provides that "If training certificates are not maintained at the mine, you must be able to provide the certificates upon request by us, miners, or their representatives." Kissell cited an MSHA policy and procedure letter that apparently provided compliance guidance, which indicated that the records should be produced within 24 hours of a request. Tr. 188-89. He further testified that he allowed "more than one day" for the records to be produced, but they were not. Tr. 189. Qmax maintains that the records were not requested until August 21, and that they were available later that day and the following day. Ex. P-29, P-30.

I find that the Secretary has failed to carry her burden of proof on this allegation. The cited portion of the regulation requires only that the records be maintained, and it is clear that they had been maintained. Moreover, Kissell knew that the records had been maintained because he had seen them two months earlier. There is no specific requirement that the records be kept at the mine site, or that they be produced within a specific time after a request is made. MSHA's guidance letter is not a binding regulation. In any event, I also find that the specific records in question were not requested until August 21. Kissell's field notes indicate that on August 20 he called Mrs. Fann and made arrangements to meet with her on August 21 and review records.
Ex. R-7 (103-M) at 18. I accept Mrs. Fann's testimony that the specific records were not requested until August 21, were located that day shortly after Kissell left, and were available at that time and thereafter. Tr. 536.

Citation No. 6292739

Citation No. 6292739 alleges a violation of 30 C.F.R. § 56.11012, which provides: "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed." Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> An approx. 20 inch wide opening at the top of the elevated jaw crusher operator platform was not barricaded to prevent persons from falling. Persons are exposed to a fall hazard of approx. 16 feet above ground level. Persons access the jaw crusher operator platform 2-3 times daily to do work.

Ex. P-28.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $133.00 has been proposed for this violation.

The Violation

The crusher operator's platform is rectangular, approximately four by six feet, and is accessed

by a fixed ladder that extends down approximately nine feet to the base of the equipment. The platform is surrounded by a railing, and there is a twenty-inch-wide opening in the railing where the ladder is located. The platform, ladder and opening in the railing are depicted in photographs taken by Kissell. Ex. P-31, P-32, P-33, P-34. The distance from the platform to the ground is 16 feet. Ex. P-32. Kissell did not cite the condition during his June 17 inspection because it was his understanding at that time that the crusher operator's platform was accessed only temporarily to activate the switch providing power to the crusher. Tr. 200. On August 21, however, he became aware that a miner accessed the platform two or three times daily to guide the excavator operator while rocks were broken on the grizzly. Tr. 201-09. Mrs. Fann had been injured while performing that function. He determined that a miner engaged in that activity could fall through the unprotected opening while attempting to avoid the rock breaking device being maneuvered by the excavator operator, or that a miner might get "knocked through" the opening by the excavator's boom. Tr. 193. Kissell determined that a person falling from the platform would land on the base of the crusher, or fall all the way to the ground, and could sustain fatal injuries.

Respondent's defense to this citation is based upon lack of fair notice and conflict with other safety regulations. Tr. 550-51. However, Kissell explained why he did not cite the condition during the June 17 inspection, and I find that a reasonably prudent person, familiar with the mining industry and the protective purposes of the regulations would have realized that the regulation required that the opening be protected while a miner worked on the platform.[20] Qmax's argument that a person on the ladder would be required to use his hands to hook and un-hook the protective chain, thereby violating 30 C.F.R. § 56.11011, is nonsensical. Tr. 555.

The unguarded opening in the railing of the crusher operator's platform presented a hazzard to a miner working on the platform, especially because the miner's attention would be directed to guiding the excavator operator, and he might have to move quickly back from the railing toward the opening to avoid the excavator's boom. I find that the regulation was violated, and that the violation was S&S. It was reasonably likely that the hazard contributed to would result in an injury and that any injury would be serious, possibly even fatal. Further, I agree with Kissell's assessment of operator negligence and the number of persons affected.

The August 25, 2003, visit and citation.

Kissell returned to Qmax on August 25, 2003, to deliver copies of the citations issued on August 20 and 21. He was accompanied by Larry Nelson, an inspector in training. As they were driving into the plant, they observed a person later identified as Frank Rhodes, on top of the Svedala screen, handing a tool to Mr. Fann, who was located on the catwalk surrounding the screen box. As Rhodes climbed down from the screen, Nelson took a photograph. Ex. P-49, P-50. Kissell determined that Rhodes should have worn fall protection while on the screen, and that Mr. Fann's allowing him to be in that position without fall protection rose to the level of an unwarrantable failure to comply with a mandatory safety standard. He issued Citation No. 6292740. Following a special investigation, Mr. Fann was also charged with the violation in his

[20] *See* discussion of the due process, "fair notice," defense, *infra*.

individual capacity.

Citation No. 6292740

Citation No. 6292740 alleges a violation of 30 C.F.R. § 56.15005, the fall protection standard. Kissell described the violation in the "Condition or Practice" section of the citation as follows:

> A miner was observed standing on top of a Svedala screen, over the screen feed head pulley (belt #EQ-204), without the required safety line or harness for fall protection. The employee was exposed to a fall of approx. 14 feet to ground level. Jim Fann, mine owner, was on the Svedala screen walkway receiving hand tools from the employee on top of the Svedala screen. A citation, #629733, was issued to the company on 08/21/2003, for a violation of this same standard and MSHA had discussed CFR-30 standard 56.15005 with Jim Fann and employees at that time. Mr. Fann stated the employee was only up here for a minute. Fall protection was available for use at the mine. Mine owner, Jim Fann, engaged in aggravated conduct constituting more than ordinary negligence in that he was aware the employee was working where a fall hazard existed and did not require the employee to wear fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. P-48.

Kissell determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one employee was affected, and that the operator's negligence was high. As noted in the citation, it was issued pursuant to section 104(d) of the Act, because of the unwarrantable failure allegation.[21] Civil penalties for this violation were proposed against the operator and against James L. Fann, in his individual capacity. A civil penalty in the amount of $625.00 has been proposed for the operator, and a penalty of $500.00 has been proposed against Mr. Fann.

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[21] The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Lopke Quarries, Inc., 23 FMSHRC 705, 711 (July 2001).

Survivability of the Claim Against James L. Fann

The allegation against James L. Fann, in his individual capacity, was brought pursuant to section 110(c) of the Act, which provides, in pertinent part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . , any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

30 U.S.C. § 820(c).

On August 24, 2006, Mrs. Fann filed a paper titled Suggestion of Death of a Party, formally noting the death of James L. Fann on the record, presenting the issue of whether the claim against him survived. In general, the survival of a federal cause of action upon the death of a party is, in the absence of an expression of contrary intent, a question of federal common law. Actions that are remedial generally survive, and actions that are penal generally do not. *U.S. v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1993); *Smith v. Dept. of Human Services, State of Okl.*, 876 F.2d 832, 834 (10th Cir. 1989); *International Cablevision, Inc., v. Sykes,* 172 F.R.D. 63 (W.D.N.Y. 1997); *and see Sinito v. U.S. Dept. of Justice*, 176 F.3d 512 (D.C.Cir. 1999).

There is nothing in the Act addressing the survivability of claims arising thereunder, or suggesting that established rules governing the abatement of actions upon the death of a party should not apply to claims under the Act. While the determination of whether a particular claim is "penal" or "remedial" for purposes of survivability can present difficult issues,[22] it appears that a claim under section 110(c) of the Act, seeking imposition of a civil penalty against an individual corporate director, officer or agent, is clearly penal in nature. Accordingly, under federal common law, the action against Mr. Fann abated upon his death and will be dismissed.[23]

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[22] *See NEC, supra; Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 414 (7th Cir. 1980) (overruled, in part, on other grounds, *Pridegon v. Gates Credit Union*, 883 F.2d 182, 193-94 (7th. Cir. 1982)). In determining whether a particular claim is penal or remedial, courts typically consider three factors: (a) whether the purpose of the statutory claim was to redress individual wrongs or wrongs to the public; (b) whether the recovery goes to the individual or the public; and (c) whether the recovery is disproportionate to the harm suffered. *NEC*, 11 F.3d at 137; *Smith*, 876 F.2d at 835; *Sykes*, 172 F.R.D. at 67.

[23] In response to an order directing the Secretary to advise of her position on the claim against Mr. Fann in light of his death, she initially took the position that the claim would be pursued, as filed. By order dated August 14, 2006, citing the above precedent, Respondent was directed to file a formal Suggestion of Death, and the Secretary was directed to show cause why the action as to Mr. Fann should not be dismissed. The Secretary responded by advising that a decision had been

The Violation as to Qmax

The Svedala screen stands about 14 feet high. The screen box, which holds three layers of screens, is approximately 6 feet wide by 20 feet long. A catwalk at the base of the screen box extends around the box. The catwalk is about 30 inches wide on the sides of the box, and about 36 inches wide on the end where the feed conveyor is located. Tr. 670. There is a railing around the perimeter of the catwalk. The top of the railing is about one foot below the uppermost edge of the screen box. Photographs taken by MSHA on the day in question show the end of the screen and catwalk where Mr. Fann was located and indicate the location of Rhodes. Ex. P-51, P-52. Photographs taken by Qmax also depict the screen box, catwalk and railing. Ex. R-19A, B and C (196-M).

Rhodes was an employee of Fann Contracting, Inc., which operated an asphalt plant at the Red Lake Quarry site. Tr. 673; ex. R-23 (196-M). He noticed Mr. Fann engaged in replacing drive belts on the feed conveyor to the Svedala screen. Rhodes climbed up onto the screen to offer assistance. When Rhodes approached, Fann was almost finished with the job. He noticed a tool on the belt, and handed it to Fann. They then saw Kissell and Nelson, who had stopped their vehicle near the screen, and had exited it in order to take a picture of them. Tr. 671-73. They wondered what the MSHA inspectors were interested in, and Rhodes mentioned the possibility of fall protection. Fann told him that, if that were the case, he should get down off the screen. Nelson's photograph depicted Rhodes as he was climbing down from the screen. Kissell informed Fann that he was going to issue an unwarrantable failure citation for Rhodes' failure to use fall protection.

The parties' positions on whether use of fall protection is required while standing on top of the screen box, and the advisability of such use, are diametrically opposed. MSHA maintains that use of fall protection is required under the regulation because there is a danger of falling 14 feet to the ground. As Kissell explained his decision, the handrails around the catwalk did not provide fall protection because Rhodes could have fallen beyond them if he fell "straight out." Tr. 380. In his and the Secretary's view, the need for fall protection was so obvious, especially in light of the prior citation and discussion concerning fall protection, that Mr. Fann was grossly negligent or acting recklessly in allowing Rhodes to be in that position.

Qmax contends that requiring the use of fall protection by persons who mount a screen box is a completely unrealistic and unheard of interpretation of the regulation, and that the use of fall protection under such circumstances would, itself, present a far greater hazard. The basis for Respondent's position is that miners routinely climb onto screens in the process of changing them, and that the use of fall protection during that process has never been required by MSHA at Qmax or anywhere else in the industry. Neither Fann, nor Qmax's miners could envision a fall protection system that could safely be used by miners engaged in changing screens. Qmax contends that Rhodes' conduct was not in violation of the regulation and, if it were, it did not have fair notice of the Secretary's interpretation of the regulation.

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made to vacate the citation as to Mr. Fann. Because the action against Mr. Fann abated upon his death, the Secretary's belated decision is a legal nullity.

While Qmax contends that there was no violation, the thrust of its argument is that MSHA's tacit approval of miners standing and working on screens without using fall protection, i.e., its inconsistent enforcement of the regulation, deprived it of fair notice of the Secretary's interpretation of the regulation. The Secretary denies any inconsistency. She also argues that Qmax's fair notice argument was not specifically raised, and that Qmax was on notice that the conduct violated the regulation. However, as discussed below, the Secretary's attempts to distinguish the cited conduct from the screen changing process are unavailing, and her arguments on fair notice are easily disposed of.

The Secretary maintains that: "This citation is not related to the question of whether fall protection is required while changing screens." Sec'y. Br. at 10. However, her attempts to distinguish the cited conduct fail to address the evidence, and are belied by her own descriptions of the conduct. Moreover, it is clear that Kissell and MSHA were well aware that the citation implicated the screen changing process from the day it was issued.

The conduct cited, as stated in the body of the citation, was a miner "standing on top of a Svedala screen." Ex. P-48. That same description was recorded by Kissell in his contemporaneous field notes, i.e., "miner was observed on top of a Svedala screen." Ex. R-7 (103-M) at 27. The Secretary's arguments in her brief reflect the same nature of the conduct charged. "The miner . . . should not have been *allowed on top of the screen* without wearing fall protection equipment." Sec'y. Br. at 9 (emphasis added). "Mr. Fann's conduct, *in allowing the miner to climb onto the screen* without being tied off, constitutes more than ordinary negligence . . . ." Sec'y. Br. at 13. (emphasis added).

Miners changing screens engage in the same conduct, i.e., climb onto, stand on, and work on top of screens. Mr. Fann testified that throughout his many years of experience, miners mounted the screen box every time the screens were changed, about once a month. Tr. 682-84. The brackets that clamp the screens in place get wedged-in tightly and miners generally stand on the screen deck and break them lose with a hammer and bar. Tr. 757-58. They then traverse the screen, carrying screen sections to a location where they can be removed. Tr. 679-80. It is not an uncommon event at Qmax or within the industry. Tr. 865-86. Kissell, who had 20 years of mining experience, most of it in operations similar to Qmax's, and had inspected roughly 200 to 500 screens, eventually agreed. Tr. 18, 34-35; ex. P-1. He related that he had heard of other methods that might be used, describing miners using "J-hooks" from the catwalk, and was aware that some newer designs allowed screens to be removed through the end of the screen box.[24]
Tr. 731-32. But, Kissell agreed that Qmax's screens had to be accessed from the top, which was true for about 90% of the screens in the industry. Tr. 753-54. He also agreed that, although he's seen it done differently, Mr. Fann's description of the process was "for the most part . . . accurate." Tr. 760.

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[24] Mr. Fann had never seen anyone replace screens from the catwalk, and it would appear to be an extremely difficult, if not impossible, task. Tr. 684-85. Respondent's photographs of the Svedala screen reveal that miners would have to reach over the approximately five-foot high lip of the screen box, lift the heavy screen, and maneuver down the catwalk around the screen's machinery. Ex. R-19C (196-M).

There is nothing in the record to indicate that Rhodes' conduct was unusually hazardous. In fact, his position, as pointed out in the Secretary's photograph, was at the end of the screen box next to the conveyor that fed the screen. Ex. P-52. At that location, there was a three-foot wide catwalk occupied by Mr. Fann, with a railing around its perimeter, and the end of the conveyor was two to three feet above the screen box. Ex. R-19C (196-M). The probability of Rhodes falling to the ground from that position was, if anything, less than that of a miner standing elsewhere on the screen. There is no evidence that Rhodes was walking around or doing anything that would have increased the likelihood of his tripping or falling. The Secretary's suggestion that Rhodes' having a wrench in his hand made a fall more likely is unconvincing. Sec'y. Br. at 10-11. Miners engaged in changing screens use a hammer and bar, i.e., they have tools in both of their hands, and four of them lift and carry segments of screens weighing approximately 85 pounds. Tr. 679-82. If anything, miners working on top of the screens during the screen changing process would have a higher risk of falling than Rhodes.

Because miners engaged in changing screens mount and stand on the screens, precisely the conduct cited by Kissell, it is little wonder that the discussion of the impact of his determination that miners on the screen had to use fall protection, triggered a discussion of how fall protection could safely be used during the screen changing process.[25] Qmax's miners, joined by Fann, directly raised concerns about using fall protection while changing screens when meeting with Kissell on August 25. Tr. 376, 676-82, 686-87; ex. R-23 (196-M). In fact, use of fall protection while changing screens was the exclusive focus of Qmax/MSHA discussions from the day the citation was issued, and there is no evidence that Kissell or anyone else at MSHA ever advised Qmax that its concerns were unwarranted, because the requirement to use fall protection while on a screen had no application to the process of changing screens.

The Secretary claims to have been surprised by Respondent's screen changing argument, asserting that: "During the hearing, Respondent raised, *for the first time*, the issue of the feasibility of using fall protection when changing screens on the Svedala screen." Sec'y. Br. at 9 (emphasis added). It would be hard to imagine a more erroneous statement. In fact, as noted above, from the day that the citation was issued, the discussion of its validity and the feasibility of abatement efforts centered exclusively on the use of fall protection while changing screens. These concerns were reiterated several times by Qmax in correspondence with MSHA officials. One example is a letter dated November 25, 2003, to Andrew Lowe, an MSHA special investigator, wherein problems with the use of fall protection while changing screens were discussed. Ex. R-10 (196-M) at 12-15. The issue was also raised in subsequent letters. Ex. R-12 (196-M) at 4, R-15 (196-M) at 3.

Qmax certainly raised the fair notice issue. As early as November 25, 2003, Qmax asserted

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[25] Rhodes' approach, as Fann replaced the conveyor's drive belts, appears to have been purely coincidental. Fann had not requested assistance, or directed any of his employees to help in the process. Tr. 667-74; ex. R-23 (196-M). Consequently, Kissell's interpretation of the regulation to require use of fall protection for a miner standing on the screen had no implications for the belt changing process. It had major, still unresolved, implications for the screen changing process.

in the letter to Lowe: "Based on information that I had on August 25, 2003[,] and instructions that Mr. Kissell had given to miners earlier, it was impossible for me or any Qmax miners to know that Kissell's interpretation would be that a miner must wear a harness and lanyard tied off on a screen of any size . . . ." Ex. R-10 (196-M), at 15. Respondent asserted in its Prehearing Report, "no tie off systems existed and neither Kissell nor Nelson brought this to the attention of the miners or the operator, on any of the 4 previous days at the Qmax plant. Fair Notice." Resp. Prehr. Rpt. (196-M) at 1.[26] (emphasis in original). The Secretary did not object to Respondent's inclusion of the fair notice argument in its prehearing report. At the hearing,
Mr. Fann testified that he had never been advised that fall protection was required for a person on a screen and, even at the time of the hearing, he had "no knowledge of fall protection having been used or required on a screen." Tr. 665. Qmax's actions were more than adequate to raise the fair notice defense, even without taking into account the less stringent standards typically applied to those "untutored in the law." *See Marin v. ASARCO, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992).

When "a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). The issue arises frequently in the enforcement of standards like that addressing fall protection, which must be written in simple terms in order to be broadly adaptable to myriad circumstances. *Alabama By-Prods. Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). To determine whether an operator received fair notice of the agency's interpretation, the Commission has applied an objective standard, the reasonably prudent person test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). In applying this standard, a wide variety of factors are considered, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question, and whether the practice at issue affected safety. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Ideal Cement Co.*, 12 FMSHRC at 2416.

The overriding factor affecting the fair notice issue, with respect to this citation, is the consistency of the Secretary's enforcement. It is clear that the vast majority of screens in use in the industry were designed so that the screens must be replaced from the top. This requires miners, when removing worn screens, to mount and stand on the screen box to break the screens' retaining brackets loose and carry the screen sections to a location where they can be lowered to the ground by machinery. The process is repeated, in reverse, when installing new screens. MSHA inspectors, like Kissell, typically have had considerable experience in the industry before being employed by MSHA. Kissell, himself, had worked with screens for several years and had seen from 200 to 500 screens. MSHA clearly had been aware of this practice for a considerable period of time. From the evidence of record, it is apparent that MSHA has almost never taken the position that a miner standing and

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[26] Respondents filed separate prehearing reports in each docket.

working on top of a screen is in danger of falling, such that the use of fall protection is required by the standard. That was the case in August of 2003, and apparently remains the case today.

Neither the Svedala, nor any other screens, were designed or built, such that fall protection devices could be used by a person on top of the screen box. Mr. Fann visited similar mining operations and did not find screens with fall protection structures. Tr. 703. He found only one exception, where a structure had been added, but the safety director of that operation told him that the structure was merely for show, and the men didn't use it because they were afraid of it.[27] Tr. 703-05. Pictures of some of the other screens observed by Fann that lacked fall protection structures were introduced into evidence. Tr. 703; ex. R-19D (196-M). Fann contacted screen manufactures and suppliers, who informed him that the issue of fall protection structures for screens had never been raised, and that an operator's addition of fall protection structures, at least to the screen box, would void the warranties. Tr. 693-94. Fann's own view, and that of his miners, was that attempting to use fall protection while changing screens posed a number of serious practical and safety issues. Tr. 676-82. He unsuccessfully sought design assistance from MSHA.[28] Tr. 691-97.

Respondent introduced an MSHA training module addressing safety practices for changing screens. Although only a guideline, it does not mention the use of fall protection, except for dealing with a special type of screen. Tr. 699-700; ex. R-6 (176M). There is no evidence that the Secretary has published any notices informing the regulated community of the position taken here, i.e., that a miner standing on a screen is in "danger of falling" within the meaning of 30 C.F.R. § 15005, such that safety belts and lines must be worn. In fact, from the evidence introduced by Respondent, it appears that she has consistently taken the position that the catwalks and handrails surrounding screen boxes are sufficient to ensure that miners standing and working on screens are not in danger of falling, within the meaning of the regulation, and is not prepared to change her interpretation of the standard without undertaking a "separate investigation with regard to the changing of screens." Sec'y. Br. at 10.

The Secretary has, over the course of years, consistently and knowingly declined to enforce the subject regulation with respect to the screen changing process. Miners have routinely climbed on, stood on, and worked on top of screens, without using fall protection, all with the Secretary's at least tacit approval. Respondent's fair notice argument was timely raised, and precludes enforcement of the regulation with respect to the conduct cited here. If the Secretary intends to take the position that a miner on top of a screen is required to use fall protection under the regulation, absent some

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[27] Kissell testified that he had seen a "couple" of screens with fall protection structures prior to issuing the citation to Qmax, and several since. Tr. 383-84. However, he identified only one location, and it appears to be the same location that Fann identified, where the safety director told him that the structure was not used. Tr. 383-84, 703-05.

[28] For the hearing, Kissell prepared diagrams of structures that might be mounted on a screen that would allow miners wearing harnesses and lanyards to tie-off. Ex. P-54, P-55, P-56. However, these were simple concept depictions, similar to a rough sketch he had prepared while talking with Qmax's miners.

unusually hazardous behavior by the miner, she would be well-advised to conduct the investigation noted in her brief, and engage in notice and comment rulemaking prior to initiating such enforcement action.

The Appropriate Civil Penalties

Qmax is a small operator, as is its controlling entity. Kissell's inspection was the first by MSHA since Qmax had reopened after several years. Consequently, for penalty purposes, Qmax has no history of violations. Qmax does not contend that payment of the penalties would impair its ability to continue in business. All of the violations were promptly abated in good faith. The gravity, negligence, and other penalty factors required to be addressed by section 110(i) of the Act have been discussed, above, with respect to each alleged violation.

Citation No. 6292708 is affirmed. However, it was found not to have been S&S. The violation was unlikely to result in an injury, and any injury would have been minor. The operator's negligence was found to have been low. A civil penalty of $75.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292709 is affirmed. However, it was found not to have been S&S. The violation was purely technical and did not constitute a hazard. A civil penalty of $91.00 was proposed by the Secretary. I impose a penalty in the amount of $15.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292734 is affirmed. However, it was found not to have been S&S. The violation contributed to created a reasonable possibility of a minor injury. A civil penalty of $106.00 was proposed by the Secretary. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292735 is affirmed. The injury report was mailed one day late, because of Mrs. Fann's injury. A civil penalty of $60.00 was proposed by the Secretary. In light of the *de minimis* nature of the violation, and the mitigating circumstances, I impose a penalty in the amount of $20.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292736 is affirmed. Mrs. Fann's task training was not recorded and certified, as required. However, the citation was corrected to reflect that no injury was likely to be caused by the violation, rather than that a lost workdays injury was unlikely. A civil penalty of $60.00 was proposed by the Secretary. In light of the reduced gravity, and the mitigating factors presented by Mrs. Fann's serious injury, I impose a penalty in the amount of $45.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6292739 is affirmed as an S&S violation. A civil penalty of $133.00 was proposed by the Secretary. I impose a penalty in the amount of $133.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation Nos. 6292707, 6292710, 6292733, 6292737, 6292738 and 6292740 are hereby **VACATED**, and the petitions as to those citations, including the petition lodged against James Fann, in his individual capacity, are hereby **DISMISSED**.

Citation Nos. 6292735 and 6292739 are hereby **AFFIRMED**. Citation Nos. 6292708, 6292709, 6292734 and 6292736 are hereby **AFFIRMED**, as modified. Respondent, Qmax, is directed to pay civil penalties totaling $333.00 for those violations. Payment shall be made within 45 days.

Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

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